IN THE

Supreme Court of the United States.

NUMBER TWO HUNDRED AND FORTY-TWO OF OCTOBER TERM, 1897.

KENT K. HAYDEN,
Appellant,

against

THE CHEMICAL NATIONAL BANK.

BRIEF FOR APPELLANT.

Abstract or Statement of the Case.

FIRST HEAD: *Condition and Nature of the Action.*

This is an appeal by the complainant from a decree of the circuit court of appeals for the second circuit affirming a decree of the circuit court for the southern district of New York, which dismissed the bill.

The bill was exhibited by Mr. Hayden, as receiver of the concerns of the Capital National Bank of Lincoln, Nebraska, in the endeavor to make the appellee account for certain monies which had once belonged to that bank, and which the appellee received after the national bank examiner had closed that bank.

SECOND HEAD: *When the Appellee received the Monies.*

The Capital National Bank finally closed its doors on the *twenty-first* of January, one thousand eight hundred and ninety-three, at the usual hour of closing.

Upon the next day—the *twenty-second* of January—and before any business had been transacted, the national bank examiner took possession (R. 114).

Upon the *next* day—the *twenty-third*—the respondent received, for the account of the Capital National Bank, the following sums:

$2,935	60
815	79
735	00
5,000	00
2,000	00
$11,486	39 (R. 19).

And upon the *next* day—the *twenty-fourth*—it received also for the account of the Capital National Bank

$833 64 (R. 19).

These sums it claims to be entitled to keep as its own, because it was then a creditor of the Capital National Bank in a sum greater than the aggregate of those sums.

Before the close of business on the twenty-third the appellee was informed, by telegraph, by the bank examiner that he was in possession of the concerns of the Capital National Bank, and that it—the appellee—must not pay any more drafts (R. 119).

Chronologically, then, the facts come thus:

January 21. The bank closes as usual.

" 22. Before the transaction of any business the bank examiner takes possession.

" 23. The appellee receives $11,486.39—in five different ways—for account of the bank. Presumably this will be in the *morning*.

" 23. The appellee receives the bank examiner's telegram informing it that he is in possession of the bank's concerns, and that it—the appellee—must not pay any more drafts. Presumably this will be in the *afternoon*, and, of course, after the appellee had received the above five sums of money.

January 24. The appellee receives, for the account of the Capital National, the final sum of $833.64.

THIRD HEAD: *Where the Monies came from.*

The sum of $5,000, received on the twenty-third, came from the Packers' National Bank of South Omaha, Nebraska, and had been mailed to the Chemical on the nineteenth "for credit and advice" of the Capital National Bank. (R. 22).

The sum of $2,000, received on the twenty-third, came from the Schuster Hax National Bank of St. Joseph, Mo., and was mailed to the Chemical on the eighteenth "for the credit of" the Capital National Bank. (R. 22).

The $2,835.60, the $815.79 and the $735 consisted of a lot of small cheques on New York, seventy-five in number, which the Capital National sent to the Chemical for collection and deposit. They were mailed at Lincoln in three letters on the nineteenth and twentieth. (R. 115–116).

Where and how the Chemical got the last sum of $833.64, which it admits it got on the twenty-fourth (R. 19), it has not told us.

FOURTH HEAD.—*The Insolvency of the Capital National.*

The bank had been insolvent certainly since July, 1891.

Its officers had been making false entries to cover up its condition as early as 1883—*nine years before* (R. 38), and continuing the practice. (R. 39, 40–45, 91–96, 98.)

When the examiner took possession the condition of things was as bad as this:

The nominal assets of the bank amounted in the aggregate to $1,117,328.83, and its liabilities to $1,435,605.63 (R. 24). Assuming, therefore, all its assets to be good, they would not have been sufficient to pay its debts within the sum of $318,276.80. But they were not by any means all good. On the contrary, $601,058.20 were worthless; $190,057.12 of them doubtful, and but $326,213.51 good.

The details are as follows:

	GOOD.	DOUBTFUL.	WORTHLESS.
Bills receivable	$236,935 62	$170,766 41	$584,269 27
Real estate and equities	60,000 00	....	....
Other assets	29,277 89	19,290 71	16,788 93
Totals	$326,213 51	$190,057 12	$601,058 20

(R. 25.)

Of the good bills receivable $187,270.56 were held by other banks (R. 25).

It thus appears that the bank had then at the utmost but $78,942.95 (balance of the good bills receivable, $49,665.06, and good "other assets," $29,277.89), with which to meet its liabilities of $1,435,605.63, *or about five and one-half per cent.*

The books of the bank showed outstanding certificates of deposit of $18,946.77, the real amounts

of which were $592,054.50. This difference was not made by additional certificates. The numbers and dates of the certificates are correctly given, but the *amounts* differ, as above (R. 98).

FIFTH HEAD: *The account between the two banks.*

On the third of January the account of the Capital National Bank with the Chemical was overdrawn $49,388.51 (R. 9).

Nevertheless the Chemical continued to pay all its drafts until the seventeenth—when it threw out a draft of $5,000 (R. 19)—although it had that day received $13,940.79 (R. 18).

The overdraft at the close of that day—and after the throwing out of the draft of $5,000—was $82,996.31 (R. 16).

Upon the eighteenth it paid drafts amounting to (R. 16).....	$6,291.38
And charged up interest amounting to..	76.28
Total	$6,367.66

And received $4,877.78 (R. 18), leaving the overdraft $84,486.19.

And it threw out a draft of $5,000 (R. 21).

On the nineteenth it paid drafts amounting to $1,471.24 (R. 16).

And it received $1,000—and credited various other items amounting to $44,150.30 (R. 18)—leaving the overdraft $40,807.13.

On the twentieth it paid drafts aggregating $2,200.04 (R. 17), and received $12,059.40 (R. 18), leaving the overdraft $30,947.77.

After this it *paid nothing*. On the twenty-first it received $5,432.45 (R. 19), leaving the overdraft $25,515.32.

On that day it threw out a draft of $5,500 (R. 21).

This was the condition of things when the bank examiner took possession—an overdraft of $25,515.32.

On the following day, as already stated, it received $11,486.39 (R. 19), and on the day after that $833.64 (R. 19).

These amounts it seeks to retain and apply on the overdraft.

In addition to the drafts thrown out, as above stated, it threw out other drafts aggregating $28,764.66 (R. 20–21).

Drafts were drawn by the Capital National on the Chemical, as follows:

On the nineteenth.....		$29.50
		2,000.00
		50.00
		3,500.00
		$5,579.50
On the twentieth.....	$2,000.00	
	90.00	
	101.82	
	32.00	
	72.59	
	64.18	
	302.00	
	4.28	
	194.12	
	25.00	
	91.44	
	61.90	
	5,000.00	
		$8,039.33
On the twenty-first.....	$20.70	
	104.70	
	97.40	
	16.48	
	9.75	
	40.00	
	98.50	
	8.40	
	1,500.00	
		1,887.93
Total.....		$15,506.76

(R. 20–21.)

Of course exceeding the remittances in question.

ACTS OF CONGRESS ARE AS FOLLOWS:

REVISED STATUTES:

"SEC. 5234. On becoming satisfied, as specified "in sections fifty-two hundred and twenty-six and "fifty-two hundred and twenty-seven, that any "association has refused to pay its circulating "notes as therein mentioned, and is in default,

By the Act of 1876 it is on becoming satisfied that the association is *insolvent*.

"the Comptroller of the Currency *may* forth- "with appoint a Receiver and require of him such "bond and security as he deems proper. Such "Receiver, under the direction of the Comptroller, "shall take possession of the books, records and "assets of every description of such association, "collect all debts, dues and claims belonging to it, "and, upon the order of a court of record of com- "petent jurisdiction, may sell or compound all "bad or doubtful debts, and, on a like order, may "sell all the real and personal property of such "association, on such terms as the Court shall di- "rect; and may, if necessary to pay the debts of "such association, enforce the individual liability "of the stockholders. Such Receiver shall pay "over all money so made to the Treasurer of the "United States, subject to the order of the Comp- "troller, and also make report to the Comptroller "of all his acts and proceedings."

"SEC. 5236. From time to time, after full pro- "vision has been first made for refunding to the "United States any deficiency in redeeming the "notes of such association, the Comptroller shall "make a *ratable* dividend of the money so paid "over to him by such receiver on all such claims "as may have been proved to his satisfaction or "adjudicated in a court of competent jurisdiction,

" and, as the proceeds of the assets of such asso
" ciation are paid over to him, shall make further
" dividends on all claims previously proved or ad-
" judicated; and the remainder of the proceeds, if
" any, shall be paid over to the shareholders of
" such association, or their legal representatives,
" in proportion to the stock by them respectively
" held."

" SEC. 5242. All transfers of the notes, bonds,
" bills of exchange, or other evidences of debt,
" owing to any national banking association, or of
" deposits to its credit; all assignments of mort-
" gages, sureties on real estate, or of judgments or
" decrees in its favor; all deposits of money, bull-
" ion, or other valuable thing for its use, or for the
" use of any of its shareholders or creditors; and
" all payments of money to either, made *after the*
" *commission of an act of insolvency or in contem-*
" *plation thereof*, made with a view to prevent the
" application of its assets in the manner prescribed
" by this chapter, or with a view to the preference
" of one creditor to another, except in payment of
" its circulating notes, shall be utterly null and
" void; and no attachment, injunction or execu-
" tion, shall be issued against such association or its
" property before final judgment in any suit, action,
" or proceeding, in any State, county or municipal
" court."

(Italics mine.)

BRIEF OF THE ARGUMENT.

I.

After the comptroller of the currency, through his examiner, had taken possession, no creditor could keep anything.

National Bank vs. *Colby*, 21 Wall., 609, was this:

On the 15th of a certain April, the bank in question refused payment of a certain draft.

On the next day, the sixteenth, the concerns of the bank were taken possession of by the *military* authorities of the United States *under instructions from the Secretary of the Treasury* (p. 610).

On the *next* day, Colby, a creditor, got an attachment and *levied* on certain property of the bank, *which was not in the possession of the military authorities.*

This was while the bank was still in possession of the military authorities, and before the appointment of a receiver (p. 610); and it was also *before the enactment which prohibited attachments against national banks*, and while they were still lawful.

Nevertheless the Court held the attachment was invalid, and, speaking by Mr. Justice Field, it said:

That it was the design, on the part of Congress, "to secure the assets of the bank for ratable dis-"tribution among its general creditors.

"This design would be defeated if a preference "in the application of the assets could be obtained "by adversary proceedings" (pp. 613–614).

In *White* vs. *Knox*, 111 U. S. 784, the Court,

speaking by Mr. Chief Justice Waite, said (p. 787):

"The business of the bank must stop when insol-
"vency is declared. Rev. Stat. sec. 5228. No
"new debt can be made after that. The only
"claims the comptroller can recognize in the settle-
"ment of the affairs of the bank are those which
"are shown by proof satisfactory to him or by the
"adjudication of a competent court to have had
"their origin in something done before the insol-
"vency. It is clearly his duty, therefore, in pay-
"ing dividends, to take the value of the claim at
"that time as the basis of distribution."

And the first sentence of this language is quoted by the Court with approval in *Richmond* v. *Irons*, 121 U. S. 27, 61.

And in *Scott* vs. *Armstrong*, 146 U. S. 499, the Court, speaking by Mr. Chief Justice Fuller, said (p. 511):

"The state of case where the claim sought to be
"offset is acquired after the act of insolvency is far
"otherwise, for the rights of the parties become
"fixed as of that time, and to sustain such a trans-
"fer would defeat the object of these provisions."

Of course the taking possession of the bank by the comptroller of the currency is both the most distinct sort of declaration of insolvency and the most open and notorious of acts of insolvency.

National Security Bank *vs.* Butler, 129 U. S. 223, 232.

And it follows that the sum of eight hundred and thirty-three dollars and sixty-four cents ($833.64) which the Chemical received on the twenty-fourth —two days *after* the bank examiner had taken possession—from a source and in a manner which it has not disclosed to us, it cannot keep.

II.

The fact that the other remittances were mailed before the bank examiner took possession does not make them the property of the Chemical as of the date of mailing.

If the cheques had been deposited in the mail pursuant to any agreement, as was the case in the decisions cited below, or even if the respondent had known anything about them, the case would be very different; but here is a bank sending cheques of other parties to its agent for collection and deposit. It could have sent them to any other agent had it pleased, and after it had once put them in the mail it could have taken them out again.

Suppose in the course of transit they had been destroyed, upon which bank would the loss have fallen?

Or suppose, instead of sending cheques, it had sent Treasury notes and they had been burned, upon which bank would the loss have fallen?

The claim is that the deposit of the cheques in the mail was a delivery. But there cannot be a delivery without an acceptance. A delivery cannot be forced upon any one against his will, and here there could not possibly be any acceptance by the Chemical until after the bank examiner had taken possession, because the Chemical did not know about it before.

Let us now suppose that the mail authorities in receiving the letters *assumed to act as the agent of the Chemical in accepting the delivery.*

This, it is submitted, is the only possible assumption left. Here is an act which would be susceptible of ratification, and let us say that it

was ratified by the Chemical on the twenty-third and twenty-fourth.

Ratification, *as between the original parties*, is equivalent to a precedent authority. *But* it is not so where the rights of third parties have intervened. *As to them the act dates only from the date of the ratification.*

It is evident that this must be so. . otherwise, assuming there to have been no negligence, the ratification could be made a year, or an hundred years, after the assumption of agency.

There was therefore no delivery until the acceptance of it by the Chemical, after the examiner had taken possession, and the cheques were still the property of the Capital when the examiner took possession on the twenty-second.

There is another aspect of the matter.

The Chemical acted in two capacities, as an agent and as a creditor.

In its capacity as agent it was to receive the cheques and make the deposit to the credit of the Capital. *After the deposit was made* and *not* until it *was* made, it could keep the money because of the overdraft. But until the deposit was actually and in fact made it was the simple agent of the Capital and bound to obey its orders.

If, therefore, after the cheques had been deposited in the mail, but before they had been received by the Chemical, the Capital had in any way got possession of them, it could have kept them as its own property. And if, after they had been deposited in the mail, it had sent to the Chemical a telegram, directing it not to deposit the cheques but to turn them over to some one else, the latter would have been bound to obey.

What the Capital could do the bank examiner of course could do, and the law has done it for him as a consequence of his taking possession.

The mail is not any different from any other carrier.

Judge Wallace cites:

Canterbury v. *Bank of Sparta*, 91 Wis,, 53;
Johnson v. *Sharp*, 310 Ohio St., 611, 618;
McKinney v. *Rhoads*, 5 Watts, 343;
Dargan v. *Richardson*, Cheves, 197;
Kirkman v. *The Bank of America*, 2 Cold., 397;
Mitchell v. *Byrne*, 6 Rich. (Law), 171, and
1 Dan. Neg. Instr. (4th ed.), § 67.
(R. 124.)

The only case which apparently bears out the position that the mail is better than any other sort of carrier is *Canterbury* v. *Bank of Sparta*, 91 Wis., 52.

The other cases are as follows:—*Johnson* v. *Sharp*, 31 Ohio St., 611. Sharp, a creditor of Wallace, prepared and sent to Wallace for execution, a deed of assignment to Sharp, in trust, of all Wallace's property, for the benefit of all Wallace's creditors. Wallace executed it and put it in the mail directed to Sharp. The court held that this was a delivery—but it did not hold it to be a delivery because of the peculiar character or sacredness of the United States mail. On the contrary it said (p. 618): "having placed it in the mail for "Sharp, the assignee, who, by his previous con- "duct, had consented to accept the trust, the pos- "session *of the carrier* must be regarded as the "possession of the assignee."

Of course here was a prior agreement.

In *McKinney* v. *Rhoads*, 5 Watts, 343,—the

court held that the delivery of an assignment in trust being necessary to make it a deed, the deposit of it in the post office, directed to the assignee, "is equally available for that purpose as a "delivery of it to *a messenger*" (p. 345).

Here also was a precedent agreement.

In *Dargan* vs. *Richardson*, Cheves, 197, Long made an assignment of goods to Dargan, and being about to leave the State, mailed the assignment to Dargan.

The court said (p. 199): "If a bill of sale (as "has been decided), *delivered to a stranger* for "the use of a third person, is a valid transfer from "the date of delivery, if the vendee accepts; *by* "*parity of reason*, where a transfer of personal "property is made by writing contained in a letter, "if the person to whom the letter is addressed, "accepts it, it shall have relation back to the date "of the letter."

In *Kirkman* v. *The Bank of America*, 2 Cold., 397, there was an express agreement that W. E. Newell & Co. were to send by mail to Kirkman & Luke four notes, endorsed in a certain way. They did so. One of the four notes was lost in the mail. The court held that it had been delivered, and that Kirkman and Luke could recover upon it. There was not any question of time in this case.

In *Mitchell* v. *Byrne*, 6 Rich. (Law), 171 the plaintiffs drew bills on Booth in Live pool which Booth accepted but failed to pay. Moon paid them "for the honor" of the plaintiffs, charged the plaintiffs with the amount and remitted the bills to them by mail. The court held that Moon could not have recovered back the bills by an action of trover, "*because he had agreed to accept the* "*personal liability of the plaintiffs for the pay-*

"*ment;* and, *in execution of that agreement*, had "charged the plaintiffs in account, with the amount "of the bills, and had surrendered the bills to "them. The plaintiffs' title to the bills was com- "plete when they were mailed to their address by "Moon."

In 1 Dan. Neg. Instr., § 67 Mr. Daniel says that "depositing them (bills) in the post-office, *with the* "*assent of the payee or endorsee*, is considered "sufficient (delivery) in the United States." He also says in the same section that "delivery may "be made to one person for another."

There remains the case of *Canterbury* v. *The Bank of Sparta*, 91 Wis. 53. That case was this: Canterbury made a draft on one Coates which was presented by the Bank of Sparta, where Coates kept an account. The account however was overdrawn. It was accepted by Coates—who told the bank to pay it. The bank made out its draft on a Chicago bank, for the amount, and mailed it to a bank at La Crosse from which the draft of Canterbury on Coates had come, with a letter stating it be "in payment of" that draft, and it gave a corresponding credit to Coates (p. 56). Learning later in the day that Coates had failed, it, by telephone, got the draft from the post-office at La Crosse; destroyed it; erased all the entries which it had in its books "respecting the payment of the draft" (p. 55) and protested the draft of Canterbury on Coates for non payment. The La Crosse bank thereupon assigned to Canterbury such cause of action as it had, and he sued the Bank of Sparta. The court held it to be liable.

If by this holding, it was intended that the mail was different from any other sort of *carrier* or messenger, so that if a thing was put in the mail it could not be stopped in transit—because it was *the mail*—not one of the cases cited in the opinion

bears it out. But I submit that it was not intended to so decide.

The court said (p. 57):

"The draft was not committed to W. E. Coates "and Co., but WAS TRANSMITTED BY THEM, *through* "*the defendant*, to the bank at LaCrosse."

And it cites *Boylston Nat. Bk.* v. *Richardson*, 101 Mass., 287; *Pacific Bk.* v. *Mitchell*, 9 Met., 297; *Pratt* v. *Foote*, 9 N. Y., 463; *Whitney* v. *City Bank*, 77 N. Y., 363; and *Eaton* v. *Cook*, 32 Vt., 58. None of these cases have anything to do with the effect of deposit *in the mail*—but bear upon the other question—that by the acts of the bank it had deliberately taken Coates' personal credit and thus made itself liable.

Thus there is no case holding that the mail is different from any other sort of messenger.

In *Curran* v. *Arkansas*, 15 How., 304, the court speaking by Mr. justice Curtis, said (p. 313): "If "a person deposit his property in the hands of an "agent he may revoke the agency and withdraw "his property at his pleasure."

The late Lord Westbury is reported to have said, when something of this kind was being argued before him: "If I send my office boy with money, "cannot I call him back? Has he suddenly been "turned into a trustee for the man to whom I told "him to take the money?"

In the opinion below it is said: "The mailing "of the remittances to the defendant did not of "itself and unconditionally entitle the Capitol

"Bank to be credited with their amount. They "were not sent at the request of the defendant, "and the circumstances are inconsistent with any "understanding that they were sent at its risk. "The fact that they became its property when "mailed does not necessarily imply that it was to "account for their value if they were lost or if "nothing was ever realized from them. If a "letter miscarries, is abstracted or destroyed, or "for any other cause fails to reach its proper "destination, the loss of its contents will fall upon "the party who has assumed the risk of its trans-"mission. If by the course of business or the "arrangement between the two banks the re-"mittances were not to be credited until they were "received by the defendant, the risk of loss in "transit rested upon the Capital Bank; and *if it* "*did, it does not prove that the remittances were* "*not the property of the defendant when they* "*were deposited in the mail.*"

This, we submit, begs the whole question.

In the judgment of Lord Ellenborough, in *Williams* v. *Everett* (14 East, 592), which was also the judgment of the court, it was said (p. 597):

"If it be money had and received for the use of "the plaintiff under the orders which accompanied "the remittance, it occurs as fit to be asked, *when* "did it become so? It could not be so before the "money was received on the bill becoming due: "and at that instant, suppose the defendants had "been robbed of the cash or notes in which the "bill in question had been paid, or they had been "burnt or lost by accident, who would have borne "the loss thus occasioned? Surely the remitter, "*Kelly*, and not the plaintiff and his other credi-"tors, in whose favour he had directed the "application of the money according to their "several proportions to be made. *This appears*

"*to us to decide the question:* for in all cases of "special property lost in the hands of an agent, "where the agent is not himself responsible for "the cause of the loss, *the liability to bear the loss* "*is the test and consequence of being the pro-* "*prietor, as the principal of such agent.*"

In that great case it was also said (p. 597): "By the act of receiving the bill, the de- "fendants agree to hold it till paid, and its "contents when paid, for the use of the re- "mitter. *It is entire to the remitter to give and* "*countermand, his own directions respecting the* "*bill as often as he pleases*, and the persons to "whom the bill is remitted may still hold the bill "till received, and its amount when received, for "the use of the remitter, until by some engage- "ment entered into by themselves with the person "who is the object of the remittance, they have "precluded themselves from so doing, and have "appropriated the remittance to the use of such "person."

But so far as the item of $833.64 is concerned—as already said, there is not the slightest proof that it was mailed before the twenty-second or that it ever came by mail at all. If the fact had been so the Chemical Bank could have proved it, as it did prove it in regard to the other items (R. 22, 114–116). It has simply admitted that it received that sum on that day for account of the Capital National (R. 19).

Judge Wheeler, in his opinion, deals with this matter by saying (R. 117) that "probably" this sum had also been sent by mail—the court of appeals deals with it by taking no notice of it.

III.

The remittances were mailed after the commission of an "act of insolvency," as well as in contemplation of insolvency.

The Chemical threw out a cheque for $5,000—on the seventeenth, the day *before* the *first* of these remittances was mailed (R. 19). This is an *act* of insolvency.

In *Brown* v. *Montgomery*, 20 N. Y. 287, the court said, by Judge Denio (p. 291):

"When a business man in a commercial town "fails to meet his paper, payable at a bank, and "especially his checks upon the bank at which he "keeps his account, the natural inference which "every one draws is, that he is no longer able to "pay his debts. Such a circumstance may occur "from oversight or accident, but those are excep-"tional cases. The failure to meet the paper is "itself a suspension of payment, and notice of "such a fact, unaccompanied with any explana-"tion which would give it a different character, is "notice of the commercial failure of the party."

The general rule as given in 2 Morse on Banks and Banking, § 623a, is:

"Insolvency is that condition of affairs in which "a merchant or business man is unable to meet "his obligations as they mature in the usual "course of business. An *act of insolvency* takes "place when this condition is demonstrated and "the person has actually failed to meet some of "his obligations. A bank is in *contemplation of* "*insolvency* reasonably when the fact becomes ap-"parent to its officers that it will presently be un-"able to meet its obligations. When the transfer

" under consideration was made such knowledge
" existed (though the officers might hope other-
" wise), and the *natural and probable consequence*
" of the transfer was a preference, and since every
" person is to be presumed to intend the natural
" and probable consequence of his own acts, there
" was a legal intent to prefer, and this cannot be
" rebutted by showing another motive."

The exact condition of facts is this:

When the Schuster Hax mailed its cheque for $2,000—on the *eighteenth*—the Capital National was in *contemplation* of insolvency—that is to say, its assets were but *five and one-half per cent.* of its liabilities.

And it had committed an *act of insolvency*—that is to say, its cheque for $5,000 had been dishonored two days before and protested one day before (R. 19).

When the Packer's Bank mailed its remittance of $5,900 and the Capital National its two remittances of $815.79 and $2,935.60—all on the *nineteenth*—the latter bank had committed *another* "*act* of insolvency." The Chemical had dishonored another cheque of $5,000 on the *eighteenth* (R. 21).

And of course the Chemical not only knew it, but it knew that it had *not* occurred through either "oversight or accident," since it had on those days received money sufficient to meet the cheques (R. 18). And the conclusion is thus irresistible that it knew of the insolvency.

This is what the court below has overlooked—its opinion expressly stating that no *act* of insolvency had been committed, and distinguishing the cases on that ground.

It is certain that the sending the monies resulted

in a preference, and after the first cheque had been thrown out the officers of the Capital had no right to suppose that any others would be paid.

The decree should be reversed.

EDWARD WINSLOW PAIGE,
Of Counsel.